

FUEL RESOURCES DEVELOPMENT CO.

IBLA 84-292

Decided November 26, 1984

Appeal from the decision of the Acting State Director, Colorado, Bureau of Land Management, affirming the issuance of notice of "incident of non-compliance" and the imposition of a monetary civil penalty.

Remanded.

1. Oil and Gas: Generally -- Oil and Gas Leases: Generally -- Oil and Gas Leases: Drilling

Where lessee's approved application to drill is conditioned upon agreement to recontour the drill site cut into a 65% slope "as much as possible to the original form," the obligation to comply is contractual, and the lessee will not be excused from compliance because of its objection that the value of the land does not justify the cost of recontouring, or on the basis that it believes the fill material will erode away, but BLM does not agree. In the circumstances, BLM's requirement to recontour to a 35% slope to partially fill the cut is not unreasonable.

APPEARANCES: Fletcher Thomas, Esq., Denver, Colo., for appellant; Lee Carie, Acting Associate State Director, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal involves a dispute between the oil and gas lessee/operator, Fuel Resources Development Company (Fuelco), and the Colorado State Office of the Bureau of Land Management (BLM) concerning the manner and extent of rehabilitation of a Fuelco drillsite which Fuelco is obliged to accomplish.

The case finds its inception in the application for permit to drill (APD), dated December 1, 1979, prepared and signed by a Fuelco representative, and submitted to the appropriate office of the Department of the Interior. Appended thereto is a document entitled "Northern Rocky Mountain Area Check Sheet for NTL-6 Multipoint Requirements to Accompany APD." Therein Fuelco included the following proposals for the restoration of the drillsite and related roads:

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C. Plan for rehabilitation of disturbed areas no longer needed for operations after construction is completed: All roads and locations no longer needed will be recontoured as much as possible to the original form and reseeded with native type vegetation.

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10. Plans for Restoration of Surface

State restoration program upon completion of operations, including:

(1) Backfilling, leveling, contouring, and waste disposal; segregation of spoils materials as needed: Pits will be backfilled when dry, trash will be confined to pits before backfilling. Location will be recontoured as much as possible to original form. Topsoil will be stockpiled on edge of location and will be replaced after recontouring.

(2) Revegetation and rehabilitation - including access roads (normally per BLM recommendations): Roads will be recontoured. Roads and location will be reseeded per BLM instructions with native type vegetation.

On January 23, 1980, an onsite inspection of the location was conducted by representatives of BLM, Fuelco, and the Geological Survey (GS). ^{1/} In consequence of this meeting various changes and amendments were agreed to, none of which is particularly germane to this appeal. However, the inspection also served as the basis of an Environmental Assessment Report (EAR), prepared by GS. Excerpts from that report follow:

A working agreement has been reached with the Bureau of Land Management, the controlling surface agency. No agreement has been reached with private surface owner. Approval of APD would be delayed until a Private Surface Owner Agreement is provided. Rehabilitation plans would be decided upon as the well neared completion; the Surface Management Agency would be consulted for technical expertise on those arrangements.

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The requirement to stockpile topsoil has been waived by BLM. The lack of topsoil in addition to the lack of a suitable stockpile area justifies this decision. The operator proposes to rehabilitate the location and access roads per the recommendations of the Bureau of Land Management.

^{1/} The functions of the Geological Survey in this regard were later transferred to the Minerals Management Service and the Bureau of Land Management.

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Should the wellsite be abandoned, surface rehabilitation would be done according to the surface agency's requirements and to USGS's satisfaction. This would involve leveling, contouring, reseeding, etc., of the location and possibly the access road in accordance with landowner's requests. If the well should produce hydrocarbons, measures would be undertaken to protect wildlife and domestic stock from the production equipment.

Fuelco then negotiated an agreement with the private owners of the adjacent surface, and submitted a copy of their agreement to BLM. That contract includes the following language: 2/

[S]hould the well be a dry hole, plugging operations will be carried out in accordance with the Federal or State rules governing this operation. After all operations are complete, the wellsite and any new road that we constructed for the well will be cleaned up and restored as close as possible to the original conditions. The restored road and location will be reseeded with a seed mixture recommended by the B.L.M.

Subsequently, on February 29, 1980, the APD was approved subject to certain additional stipulations, including the following:

8. The restoration plan for surface will include this stipulation:

If the well is a producer, all areas not necessary for production and safety shall be resloped and revegetated using the seed formula specified below:

Indian ricegrass	2 lbs/acre
Western wheatgrass	2 lbs/acre
Russian wildrye	2 lbs/acre
Shadscale	2 lbs/acre

All seed shall be drilled to a depth of one-half inch. Seeding should occur between September 15 and November 15. The above seed formula shall be used for revegetation of all disturbed area when abandonment occurs. The disturbed area shall be recontoured to natural contour.

2/ Fuelco objects to this reference to its private contract with the surface owners of adjacent acreage in the same development area, stating that "any agreement between Fuelco and the fee owners is irrelevant as those owners are not parties to this appeal and are not complaining about the state of the surface of the land." Fuelco's objection is overruled on two grounds. First, BLM required Fuelco to provide such an agreement as a pre-condition to its approval of the APD. Presumably, had the provision for surface restoration not met with BLM's approval, the APD would not have been allowed. Second, the contract is germane as evidence of what Fuelco intended at that time regarding surface restoration.

Fuelco proceeded to construct the drill site and access road by cutting them into the side of a steep mountain slope in accordance with the approved plan. Fuelco says that in order to provide a flat area to place the drilling rig, it was necessary to blast out substantial quantities of rock, which rock was piled on the side of the hill below the flat area cleared for the drillsite. Drilling was then conducted to the desired depth. Subsequently, Fuelco determined that the well was not sufficiently productive and notified BLM that it had elected to plug and abandon the well. This was accomplished on August 27, 1983, with a BLM representative present on the site.

On August 31, 1983, BLM issued a "Notice of Incidents of Noncompliance Detected" (INC), citing two specific "deficiencies." The first of these was quickly corrected by Fuelco to BLM's satisfaction. The second deficiency, the subject of this appeal, read, "Recontour and revegetate all areas in accordance with the approved plan by November 1, 1983. Coordinate with Roger Baker, BLM."

A meeting was held at the site by a representative of Fuelco and a representative of BLM. The BLM representative advised that Fuelco would be required "to recontour the site so that it will blend with the natural terrain." He reported that "[T]he site has about a 30-foot vertical cut slope on a natural 65% slope." The Fuelco representative understood that BLM expected the company to replace the blasted rock on the drillsite, slope it out to match the contour of the hill above and below the blasted area, add topsoil, and seed it. Whether that understanding was correct is not clear from the record, but it is immaterial, as the requirement was subsequently clarified. At any rate, Fuelco adopted the attitude that restoration of the site to its original contours was a practical impossibility; would be excessively expensive, costing from 25 to 30 thousand dollars; and counter-productive, in that the fill would quickly erode away into the creek drainage below, making the environmental problem worse rather than better.

These concerns were communicated in a October 5, 1983, letter from Fuelco's Manager, Engineering and Production, to BLM's State Director. That letter stated also:

Mr. Trappet acknowledged that no erosion problem existed at this time, primarily because the location site was hewn from virtually solid rock.

As the location exists now, there is nothing harmful to the environment or detrimental to aesthetics in the area.

The location is approximately 1/4 mile off the Baxter Pass road and cannot be seen from the road. Several groups of seasonal hunters have used the location as a campsite and Fuelco has cleaned up their messes. But other than hunters, no person would have occasion to see this location, which looks no better or worse than the surrounding area which has been severely ravaged by time. In fact, the location would look more natural if left in its current status.

It is Fuelco's interpretation of APD requirement No. 8 (Supplemental Stipulation) that "recontouring to a natural contour" should be done on a reasonable basis.

Fuelco does not believe Mr. Trappett's requests are reasonable.

Fuelco cannot reasonably reconstruct the mountain. Replacement of the cut with rock and dirt would, in effect, be a "phony" attempt to rebuild the solid rock wall which existed before.

The rebuilt area, which in fact would have an extremely steep slope, could be expected to be gone within two years and so would Fuelco's \$25,000. Would then Fuelco be expected to expend another \$25,000 to \$35,000?

Fuelco is prepared to do anything within reason to rehabilitate the location. However, like all businesses, Fuelco has an economic limit. Fuelco is not in such favorable economic position that it can afford to waste so much money.

The Acting State Director responded in a November 1, 1983, letter:

You state that you were directed by Mr. Trappett to "reconstruct the mountainside by pushing the rocks and dirt back into their original position." It would be unreasonable indeed to replace these materials into their original positions. I have been assured that the intent was not to require Fuelco to return the displaced materials to their original positions, but rather to reconstruct the site to approximate the original contours and to blend in with the adjoining terrain.

Mr. Leroy Waugh stated in Fuelco's December 1, 1979 APD for this well that "the location will be recontoured as much as possible to original form." Mr. Dennis Sandoval stated in Fuelco's May 14, 1980 agreement with Harold and Richard Young that "after all operations are complete, the wellsite and any new road that we constructed for the well will be cleaned up and restored as close as possible to the original condition." Supplemental Stipulation No. 8 of the approved APD dated February 29, 1980 further clarifies this point "The disturbed area shall be recontoured to natural contour." I can only assume that Fuelco did indeed intend to restore the site to approximate the original contours, and I am told that file photos indicate this contour to be an extension of the 65 percent slope above the present back cut on the pad.

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I am told by the Grand Junction District Manager that several roads and pipeline rights-of-way there have been recontoured to blend with the adjoining terrain on slopes as steep as 65 percent. His position, in which I concur, is to continue to require recontouring of these disturbances. Since you have not provided convincing proof as to why Fuelco should be granted relief from this requirement, I must request that the site be recontoured in

accordance with the terms and conditions of the approved APD and the INC dated August 31, 1983.

On November 7, 1983, another onsite meeting was held, attended by two representatives of Fuelco and three representatives of BLM. This produced a more specific and perhaps a somewhat modified demand by BLM which involved, among other requirements, "moving the fill material into the cut to achieve a 35 percent slope from the cut edge of the main drainage. The cut remaining above the fill would be between 10 and 15 feet."

Fuelco continued to object, asserting that even this restoration would still cost \$35,000. 3/

In the meanwhile, BLM had extended the compliance date from November 1, 1983, to December 5, 1983, and subsequently, due to bad weather, the completion date for the recontouring was advanced to March 1, 1984, and completion of the reseeding was set for November 1, 1984. Each setting of a completion date by BLM included an admonition to Fuelco that penalties would be assessed for failure to comply with the deadline. Assessment of penalties is provided for by 43 CFR 3163.3 4/

Fuelco filed a timely notice of appeal and petitioned the Board to suspend the effect of the order so that it might avoid the daily accrual of penalty assessments pending review by the Board. BLM interposed no objection to the motion to suspend, and the Board, perceiving no imminent threat of further environmental degradation, granted appellant's motion by order dated February 29, 1984.

In its statement of reasons for appeal, Fuelco states:

Your attention is invited to Exhibit D, which is a group of several color photographs taken October 5, 1983 of the drill-site area. As has been set forth in earlier motions, the land in question is semi-desert or arid, highly eroded by wind and a substantial distance from traveled public ways so as not to be viewed by the public, with the exception of infrequent visitations by individuals traveling off the public highway. Stated another way, the land is wasteland, not suitable for farming or grazing, with no irrigation water available to it. The hills and mountains in the area are steep. Plant life consists mostly of weeds or other unattractive vegetation that can survive with little moisture.

In pointing all the above out, let me hasten to state that it is not Fuelco's intent to, nor does it seek authority to walk

3/ During Fuelco's initial expressions of objection, when Fuelco thought it would have to recontour to the original 65-percent slope, it argued that the cost of compliance would be "\$25,000," or "\$25,000 to \$35,000." Later, even for the more moderate 35-percent contour, all references to the lower amount have been dropped, and Fuelco has spoken only of a cost of \$35,000. No cost analysis has been provided.

4/ Subsequently amended. See infra.

away from this drillsite without doing some additional rehabilitation work, such as laying in and properly grading a reasonable amount of topsoil and seeding it. However, it has concluded correctly that, once this is done, because of the terrain where the drillsite is located, it will be difficult, after the passage of some time, for anyone to determine that oil and gas drilling activities were ever conducted there. It would be futile to expend the \$35,000.00 necessary to rebuild the portion of the mountain that was blasted away to furnish a level drillsite because, once the soiling and seeding operation is completed, the drillsite operation will match the surrounding terrain due to its stark and steep character as is so well depicted in the photographs referred to above.

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Fuelco's plan to add a reasonable amount of topsoil and reseed is in compliance with the "Rule of Reason" that has been applied by the Courts and IBLA in substantially similar situations. To perform the work presently required by BLM would not accomplish anything because, in addition to the area being primarily wasteland and not visible from any public road, there was nothing of any aesthetic value at the site prior to beginning drilling operations, nor is there now.

BLM's Acting Associate Colorado State Director filed a response to Fuelco's statement of reasons, in which he takes exception to most of the statements made by Fuelco. He disagrees with Fuelco's characterization of the land as "wasteland," saying that it is used for livestock grazing, wildlife habitat and forage, and dispersed recreation. He submitted four photographs of the drillsite depicting a broader view of the terrain than those submitted by Fuelco. He maintains that other, similar sites have been recontoured successfully.

Fuelco responded, denying that the land supports either livestock grazing, wildlife forage, or dispersed recreation other than the "occasional jackrabbit hunter." It reasserts the argument that the recontoured land will be quickly eroded away, and that BLM's requirement to incur such high cost to achieve so little on land of such low value is grossly unreasonable, impractical, arbitrary, capricious, and an abuse of administrative discretion.

Fuelco states, "Perhaps the main reason this appeal is being taken is that BLM's interpretation of what is 'approximating the original contours' and that of Fuelco's are vastly divergent."

Although Fuelco has cited case authority for the proposition that requirements for site restorations imposed by various authorities are governed by a rule of "reasonableness" predicated on economic practicality, the Board finds those cases to be easily distinguishable from the instant case. Here, the obligation assumed by Fuelco is contractual in nature. Fuelco originated the proposal to "recontour as much as possible to the original form" in its original submission of its application for the permit, where that language appears twice. Fuelco contracted with the adjacent surface owners that "the

wellsite and any new road that we constructed for the well will be cleaned up and restored as close as possible to the original conditions." Fuelco understood that this restoration would have to be accomplished in accordance with BLM's requirements and to BLM's satisfaction. It accepted its APD approval conditioned by a special stipulation that "[t]he disturbed area shall be recontoured to natural contour." None of these commitments is subject to any economic or financial limitation.

Fuelco knew where and how the drillsite and access road were to be constructed before it submitted its APD. It knew in advance precisely what contours it proposed to restore "as much as possible to the original form," and it had every opportunity to assess the cost of doing what it proposed to do before it even submitted its APD. It made no effort to ascertain in advance what BLM would require in this regard.

Now, all it is willing to do is spread a mantle of topsoil over the surface and seed it. In effect this is a total repudiation of its agreement to do any recontouring whatever, since none is involved in its present rehabilitation proposal.

Based upon the photographs and descriptive information submitted by both appellant and BLM, the Board would agree that this is low value land. Even so, for the Board to attempt to define the appellant's obligation to perform according to some economic cost/benefit ratio would be wildly subjective, as environmental enhancement is virtually impossible to evaluate except subjectively. However, we need not indulge in any such exercise in this instance.

Fuelco's obligation to recontour is contractual. To allow Fuelco to simply spread topsoil on the surface and seed it without doing any recontouring would be to allow Fuelco to breach its commitment. An obligor under a contract may not unilaterally refuse to perform because it decides that performance is not worthwhile or is too expensive. Here, Fuelco proposed to recontour, agreed to recontour, BLM requires it to recontour, and recontour it must. The question, then, is whether recontouring to the extent demanded by BLM is impossible, futile, or so unreasonable as to render BLM's action arbitrary and capricious.

Fuelco has not asserted impossibility of performance as a reason for non-performance. To the contrary, it has tacitly admitted that compliance with BLM's requirement is possible by its objections to the cost of accomplishment of the work.

Fuelco's argument that the effort would be futile, in that the recontouring would soon be eroded away by the forces of nature, suggests that Fuelco is asserting the contractual defense of frustration. But frustration is a defense supporting non-performance of a contractual obligation only where there is some unforeseen intervening event which is recognized by both parties as hindering or preclusives of the obligor's ability to reasonably perform. See generally 18 Williston On Contracts § 1935 (3rd ed. 1978). Such is not the case here. There has been no such unforeseen supervening event. Conditions remain precisely as they were when the undertaking was proposed and agreed upon. Moreover, BLM disputes Fuelco's contention that

the value of the work will be quickly destroyed by erosion. The unilateral pessimism on the part of Fuelco concerning the ultimate effectiveness of the work cannot serve as its excuse not to perform it.

The Board finds that BLM's requirement to fill to a 35 percent slope, rather than the original 65 percent slope, allowing Fuelco to leave a 10 to 15 foot "highwall" at the top of the cut, is not an unreasonable standard of compliance in fulfillment of Fuelco's obligation to recontour "as much as possible to the original form" (Fuelco's language). Moreover, we find that BLM's waiver of the requirement that Fuelco stockpile topsoil on the site was reasonable, as were BLM's onsite meetings with Fuelco's representatives, and the two extensions of the time for Fuelco's performance.

The Board holds, therefore, that Fuelco must proceed with the accomplishment of the work in accordance with BLM's specifications.

However, the Board recognizes that the scheduling of the work must be accommodated to climatic conditions, and that this decision is probably issued at an unseasonable time. Moreover, the Board notes that the Department has promulgated new regulations regarding the imposition of administrative penalties, which regulations became effective on October 22, 1984. 49 FR 37356, 37365 (Sept. 21, 1984). 43 CFR 3163.4-1. Accordingly, the Board will remand the case to BLM with orders to re-issue the INC in conformity with the current regulations, specifying a timetable for performance and completion of the work, and the issuance of a notice of proposed penalty in the event of failure to comply timely.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the case is remanded to BLM for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

